Nos. 573 and 691

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

GISSEL PACKING COMPANY, INC., ET AL.

and

FOOD STORE EMPLOYEES UNION, LOCAL NO. 347, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO,
Petitioner,

v.

GISSEL PACKING CO., INC.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MOTION OF ASSOCIATED BUILDERS AND CONTRACTORS, INC., FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE

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MOTION OF ASSOCIATED BUILDERS AND CONTRACTORS, INC., FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Associated Builders and Contractors, Inc. respectfully moves this Court for leave to file the accompanying brief in this case as amicus curiae.

The consent of the Solicitor General has been obtained, but counsel for Food Store Employees Union, Local No. 347, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO, has refused to consent and counsel for the respondent, General Steel Products, Inc., has likewise refused to consent although indicating an intention not to object. Under the circumstances consent was asked from none of the other interested parties.

Associated Builders and Contractors, Inc., is a nonprofit corporation organized and existing by virtue of the laws of the State of Maryland and having a membership of approximately 2500 in 19 states. Its members are construction contractors, suppliers, financial institutions and others that have a direct interest in the construction industry.

The applicant's interest in this matter arose basically because it represents a segment of the construction industry and it has noticed that the construction industry app. rs to have no representation. The issues involved could be of vital effect throughout the entire industry.

Keeping proper balance and fairness in the nation's labor laws as applied to the construction industry is not only important, but somewhat specialized because several provisions of the National Labor Relations Act, as amended, are applicable only to the construction industry.

Hence this applicant moves that it be permitted under Rule 42(3) to file this brief as an amicus curiae.

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BRIEF OF ASSOCIATED BUILDERS AND CONTRACTORS, INC. AS AMICUS CURIAE

II. INTRODUCTION

This brief amicus curiae is submitted by Associated Builders and Contractors, Inc. as provided in Rule 42(3) of the Rules of the Supreme Court.

III. INTEREST OF ASSOCIATED BUILDERS AND CONTRACTORS, INC.

Associated Builders and Contractors, Inc., herein at times called ABC, is a Maryland non-profit association and has chapters in 19 states and represents approximately 2500 members. Its members consist of contractors and subcontractors together with other business enterprises, such as suppliers, dealers and financial institutions that are involved in construction.

The construction industry is one of the most important in the nation. Its volume of business in 1968 was approximately $80 billion. ABC has noted with concern accordingly that this industry's views are not represented in these cases. So through this brief it presents the views of its approximate 2500 members who are a segment of this industry.

Employers in the construction industry have more than a passing interest in the issues involved in these cases. It is of great concern to them because the powerful building trades unions, augmented by special considerations given them in certain provisions of the Labor-Management Relations Act, 1947, as amended, present serious problems of equity and balance in our nation's labor laws.

IV. QUESTIONS

Corollary questions which should be considered in addition to the question stated by the National Labor Relations Board are whether a Board-directed recognition based on authorization cards may thwart the desires of employees and be contrary to the intent of Congress.

V. STATUTES INVOLVED

Involved are Section 9(c) of the Wagner Act, 49 Stat. 449 (July 5, 1935) and the Labor-Management Relations Act, 61 Stat. 136 (June 23, 1947) and amended by P.L.

86-257 (Sept. 14, 1959) 29 U.S.C. Chapter 7, Subchapter II, #151, et seq.

VI. SUMMARY OF ARGUMENT

Reliance cannot be placed on card-count cases decided before the 1947 amendments to show an employer's obligation because the deletion at that time from the old Wagner Act of the words "or utilize any other suitable method" (besides the election method) nullifies such cases. Neither are cases based on an agreed or stipulated majority of any force and effect in connection with the problem before the Court.

Board policy regarding reliance on authorization cards has been inconsistent. It has relied on them at times to the detriment of labor relations stability and contrary to the intent of the act. Reliance on misleading cards and cards which have been misrepresented by the union solicitor has thwarted the real desires of employees. Cards in any event are not a dependable indication of the majority wishes of employees. The Board's contention that unfair labor practices make the conduct of elections impossible or undesirable and justify reliance on cards is without foundation in fact and is also contrary to the intent of Congress. The facts are that the Board can conduct elections under the most difficult circumstances. Its power to proscribe unfair labor practices helps make this possible. If the Board desires at times to abandon use of the election it should ask Congress for a change in the law, not change it by administrative fiat.

The entire problem is of great importance to employers in the construction industry because unions in that industry are very powerful and are the recipients of a number of statutory favoritisms.

VII. ARGUMENT

The Board urges an argument at the outset of its brief that recognition of union authorization cards as proof of majority is an employer obligation absent good faith doubt.

The pre-1947 precedents relied upon by the Board show that this argument is without merit.

In support of it on pages 18 and 19 of its brief the Board mentions three cases, in one of which there was an opinion of this Court [1] and in the other two of which it denied certiorari. These cases have no force and effect now because they were decided before the 1947 amendment to Section 9(c) of the Wagner Act, which struck out the words "or utilize any other suitable method" as an alternative to holding an election.

The Board in its brief further urges its argument on the point by referring to this Court's decision in *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62 (1956) obviously decided after the change effected by the 1947 amendments. That case adds nothing to the issue here presented, however, because there was no dispute in it about union majority. The union majority was conceded on the basis of a stipulation. There has never been any question but what an employer's voluntary recognition of a bona fide union's majority status can be valid. Such fact contributes nothing, however, toward resolving the problem where the employer as in the cases here presented questions the majority claimed solely on the basis of cards.

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[1] The Board brief refers to *Natl. Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U.S. 318, 339-340 (1940); *Natl. Labor Relations Board* v. *Remington Rand,, Inc.*, 94 F.2d 862, 868 (C.A. 2), cert. den. 304 U.S. 576 (1938); *Lebanon Steel Foundry* v. *Natl. Labor Relations Board*, 130 F.2d 404, 407 (C.A. D.C.), cert. den. 317 U.S. 659 (1942).

To bolster its argument for reliance on signed cards to demonstrate a majority, the Board's brief indicates such reliance is proper unless the employer entertains "good faith doubt." It indicates the employer's "other unfair labor practices" are a relevant consideration in determining whether "good faith doubt" exists. It states further that substantial unfair labor practices may justify a remedial order to bargain with a union which has obtained authorization cards from a majority.

A careful consideration of the problem shows that the commission of unfair labor practices proves nothing about "good faith doubt." A vicious employer might commit gross and numerous unfair labor practices against a very weak union because of determination that it should not become strong. He might at the time know full well the union represented less than a majority. On the other hand a conspicuously fair employer who scrupulously avoids unfair labor practices might or might not have honest doubt that a union which asks bargaining rights has a majority.

In commenting on imposition of the bargaining requirement as a result of unfair labor practices, Judge Learned Hand once stated, "as a penalty it might be proper, but as a link in reasoning it seems to be immaterial." *National Labor Relations Board* v. *James Thompson & Co.*, 208 F.2d 743 (1953).

The Inconsistency of the Board's Stand is Implicit in its Own Decisions.

The Board brief makes the point that bad faith will not be found in every case where the employer commits other acts constituting unfair labor practices. As examples, in footnote 20 of its brief, the Board cites eight cases in which orders to bargain were not issued despite refusals to bargain in the context of unfair labor practices.

It should be noted at this point, however, that the Board at times orders the employer to bargain on the basis of

signed authorization cards even though he has committed no "other" unfair labor practice at all. Of special concern to this friend of the Court in this connection is *H. & W. Construction Co., Inc.*, 161 NLRB 852 (1966) wherein a small construction employer which had committed no "other" unfair labor practices was required to bargain.

It is obviously Board policy moreover that once an employer examines authorization cards, which on their face show a majority, he forecloses any right to demand an election. It is well known that the proffer of such cards by a union representative to a naive employer is a common technique. An innocent employer is likely to look over such cards and may on the spur of the moment state that a majority of his employees appear to have signed.

Because of the inherent unreliability of signed cards as contrasted with an election, however, it is completely unrealistic to hold that an employer has no good faith standing to ask for an election after examining cards which have been proffered him.[2]

Professor Howard Lesnick, Professor of Law at the University of Pennsylvania, explains the unreliability of cards as follows:

> "Cards can be collected one at a time, in small groups, or at a meeting, as best suits the tactics of the organizer. There is no assurance that an employee even if he freely believes at the moment that he wishes to have the union represent him, "really" has made a measured decision. The trappings of the secret ballot election—governmental personnel, ballot boxes, and so forth—serve to impress upon the

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[2] In this connection see *H & W Construction Co.*, supra; *C & C Packing Co.*, 163 NLRB No. 90 (1967); *Pierotti, Jr. d/b/a Pierotti Motors*, 164 NLRB No. 32 (1967).

These and other cases seem to indicate that once an employer examines union authorization cards, which on their face indicate a majority, he cannot in good faith ask for an election.

> employee that he is not simply picking Miss Rheingold of 1967. Beyond that, the employees, solicited in whatever manner best suits the union, do not ordinarily have the opportunity to consider, or even be informed, about possible disadvantages to them of collective bargaining or of representation by the particular union involved. The employer, because of financial and other interests in opposing unionization, serves a public function in bringing relevant consideration to the employees' ears. Thus, employee sentiment registered after a campaign more truly reflects their free choice than does an affirmative response to what has been called 'instant unionism' through solicitation of cards." [3]

Completely out of line with Professor Lesnick's observation, the Board has taken the position that an employer's effort to gain time in which to ascertain the facts or present his point of view to the employees may show bad faith.[4] This stand of the Board is tantamount to the view that the employer should say or do nothing while the union conducts a drive to make members of employees —that the employees should hear only the union side of the case. The result negates the free speech amendment adopted in 1947 as Section 8(c) of the Act. It also undermines the democratic process which requires that the electorate should have all the *pro* and *con* information before making its decisions.

Use of Misleading Cards can Thwart Desires of Employees

A further consideration which would naturally raise good faith doubt in the mind of the employer is that the cards used are at times misleading. For example, in *S.N.C. Mfg. Co.*, 147 NLRB 809 (1964), 352 F.2d 361 (D.C. Cir. 1965) the Board found a majority without

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[3] 65 Mich. Law Review, 851, 864 (1967), *Establishment of Bargaining Rights . . . .*

[4] *Joy Silk Mills, Inc.* v. *National Labor Relations Board*, 87 U.S. App. D.C. 360, 185 F.2d 732, cert. den. 341 U.S. 914, 71 S.Ct. 734, 95 L.Ed. 1350 (1951).

holding an election where the only line of full capitals on the card recited "I want an NLRB election now." There is, to say the least, grave doubt that cards so worded could rightfully establish the fact of a union majority. Board findings of 8(a)(1) violations cannot possibly change the facts that the cards in themselves may have so deceived the employees as to nullify the value of the cards as proof of employee desires. The article in 65 Michigan Law Review 851, 856, mentioning this case, refers to "cards which on their face seem calculated to mislead."

An example was the case of *Lenz Co.* and *International Union of Electrical Radio and Machine Workers, AFL-CIO, Local 178*, 153 NLRB 1399, enf. in part 396 F.2d 905 (C.A. 6, 1968), wherein the Board, reversing its trial examiner, upheld a card-count in a background of several discriminatory discharges. The cards involved were dual purpose ones. One of them in evidence bore a request for an election in large, bold print and set forth the bargaining authorization in small print. The trial examiner found failure to establish a union majority and observed, "These cards partake too strongly of the fine print clauses in contracts used by businesses to dupe and deceive the public and the encouragement of the practice does not seem to be a proper federal function." The Board in overruling the trial examiner, failed to resolve the problem of the fine print as against the bold type but stated, "The Board has never held a card per se unreliable because it was sought for two purposes." The Court found that there had been misrepresentation in obtaining the cards and accordingly denied enforcement of the Board's order to bargain.

It has, in fact, been a common practice of the Board to rely on dual purpose cards to establish a union majority.[5]

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[5] See *International Union, United Automobile Workers* v. *NLRB.*, 363 F.2d 702 C.A.D. of C. 1966, Cert. den. sub nom. *Aero Corp.* v. *NLRB*, 385 U.S. 973 (1966); *Garland Knitting Mills of Beaufort, South Carolina, Inc.*, 170 NLRB No. 39 (1968); *Ed's Foodland of Springfield, Inc.*, 159 NLRB 1256 (1966).

In this connection the Board brief admits on page 27 that there have been abuses in the use of cards on the point of whether the employees were designating the union or were merely authorizing it to seek an election. The Board defends the use of cards, however, in those instances where there has been employer "conduct tending to destroy the conditions necessary for a fair election." To eliminate use of cards in such instances, the Board says, would permit employers "to delay or prevent unionization through interference with the election process."

This sort of reasoning by the Board is mere conjecture and thwarts the purpose of Congress as embodied in the 1947 amendments which did away with the words "any other suitable method," in Section 9(C). The Congress in these amendments obviously was undertaking to eliminate the use of other methods than elections as a means of determining a majority.

Along with those situations in which Cards are Ambiguous or Misleading are those in which the Union Organizer Misrepresents the Purpose of the Card, Telling the Employee that the Purpose is to Obtain an Election.

This appeared to be the thrust of the Court's decision regarding the cards in the *Lenz* case, supra. The bad result of such misrepresentation can be just as serious as a card which is ambiguous or misleading on its face.[6] Many employees have little ability or inclination to read. They could in such cases rely entirely on what the solicitor might tell them.

> "It is ironic," stated one observer, "that the Board denies an election or re-run in order to protect employee free choice and then orders bargaining on the basis of cards which offer even less protection."[7]

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[6] *National Labor Relations Board* v. *Gotham Shoe Manufacturing Co., Inc.*, 359 F.2d 684 (C.A. 2 1966).

[7] 25 Yale Law Journal 805, 819 (1966), *Union Authorization Cards.*

The basic danger is that if cards are relied upon the actual desires of the employees may be undercut. Cards may have this effect, it is emphasized, even though not so worded on their face as to mislead. Judge Castle ably stated the point in his dissent in *Happach* v. *National Labor Relations Board*, 353 F.2d 629 (C.A. 7, 1965) as follows:

> "The fact that the employer was subjectively in 'bad faith' in refusing to bargain with the Union—was unaware of the understanding of the circulator and the representation he had made to the other employees in obtaining their signatures—is not a basis for imposing a penalty on the employees in the form of Representation by a Union they have not chosen to represent them. On the record in the instant case an order to bargain is inconsistent with the basic purposes of the National Labor Relations Board Act. It defeats rather than contributes to industrial peace and stability in labor-management relations.
>
> "I would deny enforcement of the Board's order that the petitioner bargain with the Union."

Reliance on Cards has Been Used to the Detriment of Labor Relations Stability and the Intent of the Act.

A purpose of the nation's labor legislation is to promote stability in management-labor relations. Section 1 of the National Labor Relations Act as amended recognized this principle. It states, "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, . . ."

In implementation of this principle Section 9(e)(2) bars an election for one year in any bargaining unit or subdivision in which a valid election has been held during the preceding twelve-month period.

But in the case of *Conren, Inc. d/b/a Great Scot Supermarket* v. *N.L.R.B.*, 368 F.2d 173 (C.A. 7, 1966), cert. den. 386 U.S. 974, it was held by the Board and enforced by the Court, with a dissenting opinion that a valid election resulting in a "no union" vote did not preclude the rejected union from demanding recognition during the ensuing year on the basis of authorization cards.

This decision encourages unstable labor relations. It keeps ever alive the threat that there will be a union campaign for employee support through authorization cards immediately following a lost election. It has been observed that the opinion fails to give proper consideration to the purpose of Section 9(c)(3).[8] One authority points out that it creates a dilemma for employers. Since the employer cannot petition for an election and he is unwilling to go through the ordeal of defending an 8(a)(5) charge, he is inclined to bargain with the union claiming a card majority. There is danger a competing union may file 8(a)(2) charges and upset industrial stability. Further, the decision throttles the employer's right to campaign legitimately for employee support.[9]

Those who believe in fair play are naturally disturbed when they discover that the use of authorization cards within a year to upset a union-lost election does not work in reverse. The Board holds that if the union wins an election, but a majority of employees in the unit sign a repudiation of the election result, nevertheless the election stands.

In the case of *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, affirming 204 F.2d 899, and enforcing 98 N.L.R.B. 976 (1954), the union won an election. A week later and before certification a letter signed by an even greater majority of the employees than had voted

[8] See 1967 Duke Law Journal 444, 448, *Labor Law: . . . Section 9(c)(3).*

[9] See 42 New York University Law Review 369, 375 (1967), *Union may achieve representation . . . within one year of "No Union" vote.*

for the union, repudiated their desire to have the union represent them. The Board nevertheless ordered the employer to bargain and was upheld. Justice Frankfurter stated in rendering this Court's opinion:

> "Since an election is a solemn and costly occasion, conducted under safeguards to voluntary choice, revocation of authority should occur by a procedure no less solemn than that of the initial designation. A petition or a public meeting—in which those voting for and against unionism are disclosed to management, and in which the influences of mass psychology are present—is not comparable to the privacy and independence of the voting booth."

Good reasons for refusing to decide the majority question by the election process are lacking.

Usually the situation represents a setting in which the employer is found to have committed violations of Section 8(a)(1) because of interrogation of his employees or because of comments made to them. If the employer is to look into the majority question with thoroughness it is almost a necessity that he have conversations with employees about the subject. As Judge Brown indicated in *NLRB* v. *Dan River Mills*, 274 F.2d 381, 388-89 (C.A. 5, 1960), the employer stands almost helpless when he understages such an inquiry. He stated further:

> "All the while, all that is done, all that is said, all that is asked, all that is answered rests in the uncertain recollection of the partisan participants. What begins as the employer's quest now ends in the employer's flight. And now no longer will his conduct be judged alone by what was said. Now, through the unavoidable nature of our legal administrative machinery, it will be judged by what interested partisans say one said was said, or what others have said to have said say was said."

This type of situation, which is the rule rather than the exception, presents no sound reason for refusing to rely

on the election process. It is absurd, moreover, to conclude that such activity is evidence that good faith doubt is lacking.

It is likewise absurd to conclude that such activity leaves the Board helpless to conduct a fair election. In the recent Longshoremen's strike the Board, with notable success, conducted elections as to the strike's termination. These uses of the secret ballot in this kind of heated labor dispute show that elections can be and are held even under very difficult circumstances. One agent of the Board boasted in a speech about the meticulous way in which election proceedings are handled when he said:

> "In holding these elections, the agency has posted election notices and has distributed voting ballots not only in the most isolated areas of this country, but has translated notices of elections and ballots into almost every language of the world, ranging from Spanish, Polish, German, Yugoslavian, Yiddish, Russian, Chinese, Japanese to Tagalog." [10]

The facts are moreover that with all the powers wielded by the Board today to throttle unfair labor practices, it is unrealistic to conclude that an employer can prevent a fair election. In fact, it is conceivable that an employer who took an exceedingly vigorous line of interference might bring such adverse employee reaction as to give the union a majority of votes cast in a secret ballot election.

The Board on occasion has even held elections by mail. *National Labor Relations Board* v. *Groendyke Transport, Inc.*, 372 F.2d 137 (C.A. 10), cert. den. 387 U.S. 932 (1967). It has also exercised the prerogative of using I.B.M. voting cards. *N.Y. Shipping Association*, 109 N.L.R.B. 310 (1954).

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[10] Speech by Stephen Gordon, Associate General Counsel of NLRB, April 1968, Labor Law Journal, pp. 201, 222.

The recital of Board decisions as detailed above indicate unfortunately that the Board views the order to bargain pursuant to signed authorization cards from a majority as the most effective remedy to counter unfair labor practices. Board reasoning seems to be that: (1) The bargaining order is something the recalcitrant employer deserves, being what he most abhors. (2) It is likely to deter other employers from engaging in similar unfair labor practices. The theory is that when the employer allegedly interferes with the election, as in *Bernel Foam Products Co.*, 146 NLRB 1277 (1964) or in the *General Steel* case here presented, the employer must not be allowed to benefit from his own misconduct. The Board fortifies this reasoning with the further reasoning that the employer's conduct shows a lack of good faith doubt of the union's majority.

The one test that should be applied to such reasoning is whether it protects employee freedom of choice. For the reasoning to stand scrutiny it must be unmistakeable that under the circumstances the cards are a better index of employee desires than an election for which they are a substitute.

The unreliability of cards has been referred to in some of the cases cited earlier.

That they are not a reliable bellweather of what an election might show is borne out by a study made in the Board's Atlanta Region in 1960. National Labor Relations Board Chairman Frank W. McCulloch, speaking before the Section of Labor Relations Law of the American Bar Association in 1962, referring to this study, stated:

> "In 58 elections, the unions presented authorization cards from 30 to 50 per cent of the employees; and they won 11, or 19% of them. In 87 elections, the unions presented authorization cards from 50 to 70 per cent of the employees; and they won 42

> or 52% of them. In 57 elections, the unions presented authorization cards from over 70% of the employees, and they won 42 or 74% of them." [11]

The unquestioned greater reliability of the secret ballot was thus attested by one court in 1968 which stated:

> "We do not say that the Board should never, in the absence of a secret ballot, determine that a majority of the employees in an appropriate unit have selected a particular labor organization as its bargaining representative. But we do point out that there is a vast difference between such a choice registered as a result of a secret ballot, and such a choice established by the introduction into evidence of signed cards, collected at the behest of the union organizer." [12]

Even the old Wagner Act Board recognized the greater efficacy of the election to resolve difficult majority claims.[13]

The use of unfair labor practice findings to determine lack of employer good faith as to a majority, it is emphasized, gives greater weight to punishing the employer than to implementing the employees' right to have a fully protected free choice.

Congress made it clear that it intended use of the secret ballot to be relied upon to determine majority representation.

Chief Judge Haynesworth, in *National Labor Relations Board* v. *Logan Packing Co.*,[14] made this point unmistaka-

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[11] Proceedings of Section of Labor Relations Law, American Bar Assn., 1962, pp. 14, 17.

[12] *National Labor Relations Board* v. *Hannaford Bros. Co.*, 261 F.2d 638 (C.A. 1 1958).

[13] *Cudahy Packing Co.* and *United Packing House Workers, Etc.*, 13 NLRB 526 (1939).

[14] 386 F.2d 562 (C.A. 4 1967), enforcing in part and denying in part 152 NLRB 421.

bly clear. He stated in referring to what the legislators did:

> "They specifically repealed that part of Sec. 9(c) which had authorized the Board to employ 'any other suitable method' of resolving such questions, leaving a secret election as the sole basis of a certification. They also extended to an employer the right to petition for an election after receipt of a bargaining demand, though only one union was involved.[15] It was made plain in the Committee reports,[16] however, that an employer, after receipt of a demand to bargain from a union claiming to represent a majority of the employees, need not petition for an election. He had the alternative of waiting for the union to invoke the Board's election processes. But he was assured of an election on his own petition if the union sought to obtain recognition by means other than an election. There was a minority report,[17] but it questioned none of this; it objected only to the absence of express authority in the Board to dismiss an employer's election petition if there were no doubt that an established, recognized union still represented a majority of the employees. The statute was enacted without language giving the Board the very limited discretion the minority thought it should have." [18]

Realistically, there could hardly have been any other reason to strike from the text of Section 9(c) the words, "or utilize any other suitable method," except to require reliance on the secret ballot. It is noted, as the opinion by

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[15] 29 U.S.C.A. #159(c)(1)(B).

[16] S.Rep. No. 105, 80th Cong. 1st Sess., Part 1, p. 25 (1947); H.Rep. No. 245, 80th Cong., 1st Sess. p. 35 (1947).

[17] S.Rep. No. 105, 80th Cong., 1st Sess. Part II, p. 11 (1947).

[18] See generally, Note, 75 Yale L.J. 805, 820, supra N. 17.

[Note: Footnote 15 through 18 are numbered 31 through 34 in Chief Judge Haynesworth's opinion. The reference back in footnote 18 is to an earlier footnote in the opinion.]

Chief Judge Haynesworth suggests, that both the majority and minority reports of Senator Taft's Committee show a purpose to grant the employer an absolute right to an election.[19] This change was made even though the minority urged it could be used by employers to work against unions.[20] The minority report, moreover, mentioned the elimination of cards in lieu of elections.[21]

Those who urge that the present use of cards is following the intent of Congress point out that in Section 9(a) there is reference to "Representatives designated or selected." Either the word "designated" or "selected," however, can refer to the secret ballot process. Moreover, the words could likewise refer to the "consent" card check or to an election or even to an agreement of the employer to bargain on the basis that his personal knowledge of the situation causes him to recognize the union. It is utterly absurd to say this language as left in Section 9(a) gave the Board a carte blanche to rely on cards in lieu of an election.

If the rule is to be changed from the clear intent of the 1947 amendments to require reliance on elections rather than authorization cards, then the change should come from Congress and not from the Board.

In the construction industry, the unions are exceedingly powerful and employees have no need of the very generous policy followed by the Board with respect to authorization cards. As a matter of fact, they pretty well controlled the construction industry in urban centers long before the Board asserted jurisdiction over it.[22] Eight of the big building and construction trade unions actually op-

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[19] See references in notes 16 and 17 supra.

[20] S.Rep. No. 105, 80th Cong. 1st Sess., Part 2, p. 11.

[21] Id. Part 2, p. 34.

[22] *American Labor Unions* by Florence Peterson (Harper Bros. 1945) p. 204.

posed the Board's somewhat belated decision to assert jurisdiction over the industry.[23]

Moreover, since that time these unions have received substantial favored treatment through approval in Section 8(f) of the 1947 amendments of pre-hire collective bargaining contracts with the so-called 7-day union shop proviso; also the favoritism in the proviso portion of Section 8(e) which in substance allows collective agreements to limit business to be done at the construction site to specific labor organizations.

These special privileges build up pressures which are brought to bear on employers in the construction industry, and the small employer is especially vulnerable to such pressures. Through reliance on authorization cards to establish a union's majority an additional pressure is brought to bear on construction industry employers. These employers have a vital interest in maintaining balance and fair play in labor relations. It is submitted that to pursue the intent of Congress through placing reliance on elections will help achieve such a result.

VIII. CONCLUSION

The Board's reliance on union authorization cards to establish majority representation is without merit. Its contention that employers who have committed unfair labor practices thereby may show themselves to be without good faith doubt as to the union's claimed majority is not based on sound reasoning. The rule assumes the reliability of such cards as proof of majority, moreover, whereas there are sound reasons to conclude that they are unreliable. The Board's imposition of an order to bargain in such cases may serve as a penalty on the em-

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[23] Labor Law Journal, Jan. 1952, pp. 7, 12. See *Plumbing Contractors Assn. of Baltimore, Md. Inc.*, 93 NLRB 1081 (1951); *Plumbing and Heating Contractors Assn. of Olean, N.Y.*, 93 NLRB 1099 (1951).

ployer, but it loses sight of the real purpose of giving union representation to the employees only if they want it. Congress undertook to protect the wishes of employees in the 1947 amendments when it provided that the Board should rely on the election, not "any other suitable method." If the Board wishes to change this rule it should obtain the change by persuasion of Congress, not by administrative fiat.

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APPENDIX

National Labor Relations Act (Wagner Act)

49 Stat. 449 (1935) Section 9(c)

> (c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

Relevant provisions of National Labor Relations Act, as amended, (1947) 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq.

> 8(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

> 8(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, that nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting

of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work.

8(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area; Provided, That nothing in this subsection shall set aside the final proviso to section 8(a) (3) of this Act: Provided further, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).

Sec. 9(a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representative of

all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect; Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

Sec. 9(c) (3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

Sec. 9(e) (1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a) (3) of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

Sec. 9(e) (2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.